



The Florida Bar



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July 23, 2007

The Honorable Robert Wexler
U.S. House of Representatives
Washington, D.C. 20515

Re: H.R. 3013, the “Attorney-Client Privilege Protection Act of 2007”

Dear Representative Wexler:

On behalf of The Florida Bar and its more than 81,000 members, I write to express our strong support for H.R. 3013, the “Attorney-Client Privilege Protection Act of 2007,” which is scheduled for markup by the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security on July 24 and by the full House Judiciary Committee shortly thereafter. This bipartisan bill, which is sponsored by Representatives Bobby Scott, Randy Forbes, and numerous other House Judiciary Committee leaders from both parties, would reverse the harmful Justice Department policies contained in its 2006 “McNulty Memorandum”—and other similar federal agency policies—that are seriously eroding the attorney-client privilege, the work product doctrine, and the Constitutional rights of employees. In our view, H.R. 3013 would protect these fundamental rights without impairing the ability of prosecutors to gather the information they need to enforce the law.

The Justice Department’s original privilege waiver and employee rights policies, set forth in the 1999 “Holder Memorandum” and the 2003 “Thompson Memorandum,” instructed federal prosecutors to consider certain factors in determining whether corporations and other organizations should receive cooperation credit—and hence leniency—during government investigations. One of the key factors cited in these Justice Department policies—and in similar federal policies adopted by the Securities and Exchange Commission, the Environmental Protection Agency, the U.S. Sentencing Commission, the Commodity Future Trading Commission, and others—is the organization’s waiver of the attorney-client privilege and work product protections and provision of this confidential information to government investigators. Another key factor in many of these policies is the company’s willingness to not pay its employees’ legal fees during investigations, to fire the employees for exercising their Fifth Amendment rights, or to take other punitive actions against them long before any guilt has been established.

After considering the concerns raised by the American Bar Association, former Justice Department officials, congressional leaders, and others, the Sentencing Commission voted unanimously in April 2006 to remove the privilege waiver provisions from the Federal Sentencing Guidelines, and that change became effective last November. In addition, the CFTC voted to reverse its privilege waiver policy in March 2007, though its harmful employee rights policies remain in place. Unfortunately, the Justice Department and the other federal agencies have refused to reverse or fundamentally change their harmful privilege waiver or employee rights policies. Although the Department issued new cooperation guidelines on December 12, 2006, as part of the “McNulty Memorandum,” the new policy falls far short of what is needed to prevent further erosion of fundamental attorney-client privilege, work product, and employee legal protections.¹

The Florida Bar is concerned that unless the Justice Department and other federal agency policies are reversed, they will continue to cause the routine compelled waiver of fundamental attorney-client privilege and work product protections. Instead of eliminating the improper practice of forcing companies and other entities to waive in return for cooperation credit, the McNulty Memorandum still allows prosecutors to demand waiver after receiving high level Department approval. More importantly, the new policy continues to encourage routine waiver by granting companies credit if they “voluntarily” waive without being asked. Unfortunately, since the McNulty Memorandum was issued in December 2006, prosecutor demands for waiver have continued, though most demands are now *informal*, so as not to trigger the procedural requirements of the new memorandum.

By pressuring companies to waive their privileges on a routine basis, the Justice Department’s McNulty Memorandum and the other similar federal policies are seriously weakening the confidential attorney-client relationship between companies and their lawyers and undermining companies’ internal compliance programs. Lawyers play a key role in helping companies and their officials to comply with the law and act in the entity’s best interests. To fulfill this role, lawyers must enjoy the trust and confidence of the company’s officers, directors, and employees, and must be provided with all relevant information necessary to properly represent the entity. By pressuring companies to waive these fundamental protections, the McNulty Memorandum and the other similar federal policies discourage company personnel from consulting with the company lawyers, thereby impeding the lawyers’ ability to conduct thorough internal investigations and effectively counsel compliance with the law. This harms companies, employees, and the investing public as well.


¹ For a detailed analysis of the McNulty Memorandum and S. 186, please see the American Bar Association’s March 8, 2007 statement to the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security, available online at http://www.abanet.org/poladv/letters/attyclient/2007mar08_privwaivh_t.pdf The Florida Bar is working closely with the ABA and a broad coalition of business and legal groups—ranging from the U.S. Chamber of Commerce to the ACLU—in an effort to reverse the various federal government waiver policies and pass corrective legislation.

The Justice Department's McNulty Memorandum and the other similar federal agency policies also are seriously eroding employees' legal rights by pressuring companies to take unfair punitive action against them during investigations. While the McNulty Memorandum now bars prosecutors from requiring companies to forgo paying their employees' legal fees in many cases, it was only after a court, in the important KPMG prosecution in New York, found that the prior policy of government interference with KPMG's payment of legal fees for its employees violated the employees' Fifth and Sixth Amendment rights. *U.S. v. Stein*, 435 F.Supp.2d 330 (S.D.N.Y. 2006.). But the McNulty Memorandum carves out a broad exception that could swallow the new general rule. In addition, the new memorandum and the similar policies adopted by other federal agencies deny credit to companies that choose to assist their employees with their legal defenses or decline to fire them for exercising their Fifth Amendment rights against self-incrimination. By forcing companies to punish employees long before any guilt has been shown, these policies weaken the Constitutional presumption of innocence and undermine principles of sound corporate governance.

For all of these reasons, The Florida Bar believes that the McNulty Memorandum and the other similar federal policies are fundamentally flawed and must be reversed. Therefore, we urge you to support H.R. 3013, which would bar the Justice Department and other federal agencies from pressuring companies to waive their privileges or take unfair punitive actions against their employees as conditions for receiving cooperation credit. In our view, H.R. 3013 would strike the proper balance between effective law enforcement and the preservation of essential attorney-client privilege, work product, and employee legal protections.

Thank you for considering the views of The Florida Bar on this critical issue. If you have any questions regarding our position or would like more information, please contact Marcos Daniel Jimenez, Chair of The Florida Bar's Task Force on Attorney-Client Privilege at (305)373-1000, or Mary Ellen Bateman, staff to the task force at (850)561-5777.

Sincerely,



Francisco R. Angones

cc: John G. White, III, President-elect
John F. Harkness, Jr., Executive Director